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No. 90-839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF KERN,
Petitioner,
vs.
DAN ABSHIRE, DENNIS CARROLL, KARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE McKENZIE, BOB TEMPLE, BARRY SHULZ, JIM CHAPMAN, BOB TURNER, and STEVE McLEMORE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, COUNTY SUPERVISORS ASSOCIATION OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, CITY OF LOS ANGELES, CITY OF SAN DIEGO and 77 ADDITIONAL CITIES, COUNTIES AND TOWNS OF THE STATE OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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ADDITIONAL AMICI CURIAE:

CITIES: ALAMEDA, ANTIOCH, BURLINGAME, CAPITOLA, CHICO, CLEARLAKE, CLOVERDALE, DALY CITY, DEL REY OAKS, EL CERRITO, EXETER, FARMERSVILLE, FREMONT, GILROY, GLENDALE, GROVER CITY, HAYWARD, HEALDSBURG, HERCULES, HUNTINGTON, INDIO, LAFAYETTE, LINDSAY, MARINA, McFARLAND, MORGAN HILL, NAPA, NEWPORT BEACH, NOVATO, ORINDA, PACIFIC GROVE, PACIFICA, PALM DESERT, PITTSBURG, PLEASANT HILL, PORTERVILLE, REDWOOD CITY, RIVERSIDE, ROSEVILLE, SAN BUENAVENTURA, SAN LUIS OBISPO, SAN MATEO, SAN PABLO, SANTA CLARA, SANTA CRUZ, SANTA PAULA, SANTA ROSA, SEASIDE, SONOMA, SOUTH SAN FRANCISCO, SUNNYVALE, TEHACHAPI, TULARE, TUSTIN, VACAVILLE, VISALIA, WALNUT CREEK, WATERFORD, WATSONVILLE, WOODLAKE

COUNTIES: BUTTE, CONTRA COSTA, GLENN, LAKE, LASSEN, MARIN, PLACER, PLUMAS, RIVERSIDE, SACRAMENTO, SAN LUIS OBISPO, SAN MATEO, YOLO

TOWNS: FAIRFAX, MILL VALLEY, MORAGA, TIBURON

QUESTIONS PRESENTED

1. Does that portion of the "salary basis test" set forth in 29 C.F.R. § 541.118 which states that an employee cannot be considered salaried if his pay may be reduced for an absence of less than one day, and, therefore, on that basis, cannot meet the executive, administrative, or professional overtime exemption, validly apply to public sector employment?

2. Does the application of this aspect of the salary basis test to executive, administrative or professional employees of public agencies violate the Tenth Amendment by destroying the accountability of public sector managers to public agencies and the public, or by denying local governments the safeguards of the political process as contemplated in

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (Garcia)?

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INTEREST OF AMICI CURIAE

This brief *amici curiae* is filed on behalf of 518 local governments of the State of California.

Amicus League of California Cities (League) is a non-partisan, non-political organization composed of all 460 cities and towns within the State of California. The League operates through its Board of Directors and Policy Committees, which are composed of members of city councils and mayors of all cities in the State of California.

Amicus County Supervisors Association of California (CSAC) is a non-partisan, non-political organization which is composed of more than 250 County Supervisors. The members of CSAC in turn represent all 58 Counties which comprise the State of California.

Amici the City and County of San

Francisco, the City of Los Angeles, and the City of San Diego are each incorporated cities in the State of California. Los Angeles is the largest city in the State of California and the second largest city in the United States. San Diego and San Francisco are respectively the second and fourth largest cities in California. Also appearing as individual Amici are over seventy (70) California cities, towns and counties.

The Amici are responsible for providing nearly all of the local government services to the citizens of the State of California. The decision below has a dramatic and adverse fiscal impact upon Amici, on Amici's delivery of local governmental services, and upon local governmental accountability to all citizens of the State of California.

Collectively, Amici employ in excess of 500,000 employees.[1] Approximately 25 percent of these employees [125,000], have been designated by the cities or counties which employ them under the Fair Labor Standards Act's executive, administrative or professional overtime exemptions contained in 29 U.S.C. § 213(a)(1). These exempt employees include mid-level and senior managers such as chiefs of police, directors of public works, directors of social services, and directors of finance, as well as the highest administrative officials of local government such as city managers, county executives, and their management staff. The great majority of these employees earn over $50,000 per

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[1] California counties employ approximately 274,000 employees; California cities employ approximately 236,000 employees.

year. Virtually all of the local governments represented in this brief have for many years had in place rules, ordinances or regulations which require that public employees account for all working time and which limits payment of compensation for time not worked in accordance with specific paid leave policies. By virtue of the application of the rule enunciated by the Court below, all of these employees who had heretofore been considered exempt may now be entitled to hourly time and one-half overtime compensation under the Fair Labor Standards Act (FLSA or Act).

If the decision below is permitted to stand, the fiscal consequences for local government are enormous. Amici have conducted internal studies as to the potential cost for past overtime liability which may be due to executive,

administrative, and professional employees if the manner of applying the salary basis test is sustained. These past liabilities for two years are alone estimated to exceed $2 billion for California cities and counties.[2]

In addition to this fiscal impact, the decision below will adversely affect the administration of local public agencies pursuant to policies established by local legislative bodies. The rules and ordinances adopted by Amici, which require that public officials account for the time which they are absent from work go to the central core of the accountability of state and local government to

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[2] The Abshire decision has fiscal ramifications which go beyond its impact on cities and counties. The State of California employs over 60,000 employees whose exempt status may be effected by Abshire. Special districts in California (exclusive of school districts) employ 115,000 persons.

the public.

A number of the cities and counties appearing as Amici are parties to litigation in which the application of the salary basis test is pivotal to the claims of the litigants. These cases, which were filed shortly after the Abshire decision was issued, involve thousands of employees, and millions of dollars in past compensation and liquidated damages.

Pursuant to Rule 37.3, the parties have consented to the filing of this Amicus Brief. The letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Salaried executive, administrative and professional employees are expressly excluded from the provisions of the FLSA, 29 U.S.C. § 201 *et seq.*, that re-

quire time and one-half premium pay for overtime. In Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), the Ninth Circuit held that Kern County Fire Battalion Chiefs were not bona fide executive[3] exempt employees pursuant to 29 U.S.C. § 213(a)(1) because such employees' salary was subject to a potential deduction for absences from work of less than one day's duration.

Eligibility for exemption from the overtime provisions of the Act is based on both a "duties test" and a "salary test." These tests are addressed in detail in the regulations adopted by the Department of Labor (Department or

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[3] Although the Court did not specifically address the other two FLSA exemptions - the administrative and professional exemptions - the basis of the decision would extend to employees exempt from the Act pursuant to these "white-collar" exemptions as well.

DOL),[4] the agency charged with enforcing the FLSA. If an employee performs the specified types of discretionary managerial, administrative or professional duties, and is paid a salary above $250 per week, the employee is exempted from the hourly premium overtime provisions of the Act.

The Court in Abshire did not address the duties aspect of the exemptions, but focused solely on the salary test under the Department's regulations. In particular, the Court focused on two subparagraphs of one salary test regulation, which provides:

> "Deductions (from predetermined compensation) may be made ... when the employee absents himself from work for a day or more for personal reasons ... or absences of a day or more occasioned by sickness or disability ... ." 29 C.F.R. § 541.118(a)(2) and (a)(3).

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[4] See 29 C.F.R. Part 541.

Abshire held that, therefore, in order to satisfy the salary test, an employee's pay cannot be subject to deductions for absences of less than a day.

Since under County policy the salary of Kern County Fire Battalion Chiefs was subject to deductions for absences of less than one day (though such deductions had never been made), the Court held that the Battalion Chiefs were not exempt from the premium overtime provisions of the FLSA. Thus, the decision requires the County to pay retroactive premium overtime compensation to these employees for a period of two years. 29 U.S.C. § 255. The reasoning and holding of the decision applies equally to all other bona fide County managers, administrators and professional staff paid in excess of the requisite salaries.

Regulations issued by the DOL after

Congress' enactment of the "Fair Labor Standards Amendments of 1985"[5] did not address the exemptions. However, in a January 9, 1987, Administrative Letter Ruling, the DOL indicated that changes in 29 C.F.R. Part 541,[6] including that aspect of the salary test considered in Abshire, have been under consideration, and thus, the Department was taking a nonenforcement position with respect to that aspect of the salary basis test for otherwise bona fide exempt executive, administrative and professional

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[5] Enacted in response to this Court's decision in Garcia, applying the Act generally to the public sector.

[6] 29 C.F.R. Part 541 was first enacted in 1949, long before the FLSA ever became applicable to the public sector. In enacting these regulations, the DOL, therefore, had no occasion to consider the unique aspects of public sector employment, including government's accountability to the public it serves.

employees employed by public entities.[7]

Although not an affirmative interpretation, the Administrative Letter Ruling is a strong indication of DOL's intention to amend the salary test.

The "Fair Labor Standards Amendments of 1985" and the DOL's regulations adopted thereafter recognized distinctions in labor standards between the public and private sector. Kern County's contention, shared by Amici, is that application of this aspect of the salary test--which was originally enacted for and uniquely applicable to private sector employment--cannot, consistent with Congressional intent and in conformance with Constitutional standards, be made applicable to state and

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[7] This Administrative Letter Ruling is set out at pp. 21-22 *infra*.

local government employment.

REASONS FOR GRANTING A WRIT OF CERTIORARI, OR IN THE ALTERNATIVE, FOR VACATING THE DECISION OF THE NINTH CIRCUIT

This litigation is one of numerous cases currently pending in the lower courts which presents the question of whether this aspect of the "salary basis test" set forth in the Code of Federal Regulations must be strictly complied with in order for executive, administrative and professional employees of public agencies to qualify to be exempt from the premium pay overtime provisions of the FLSA. The Ninth Circuit's decision is the first appellate ruling which has concluded that this aspect of the salary basis test is properly applied to public sector employment, thereby precluding overtime exemption of public sector managers.

In summary, the reasons why a writ should issue, or that the decision of the Ninth Circuit should be vacated, are these:

1. The decision in Abshire is erroneous because the Court rejected the DOL's administrative application of the statute, the DOL being the agency charged with enforcing the Act. DOL's application of the exemption, i.e. that this aspect of the salary basis test is not to be applied to public employees, is a valid administrative interpretation of the FLSA. The Ninth Circuit's unjustified departure from this application of the exemption exceeds the limits of judicial authority established by the Court in Garcia;

2. Application of this aspect of the salary basis test to public employees who perform bona fide executive, profes-

sional or administrative duties is inconsistent with the intent of Congress;

3. This Court's decision in Garcia indicated that there were as yet undefined limits imposed by the Tenth Amendment upon Congressional actions which may unduly burden the states. Application of this aspect of the salary basis test to otherwise bona fide executive, professional and administrative employees involves a direct impairment of the sovereignty of local governments. Public entities and the public they serve are entitled to determine the degree to which they can expect accountability from their public officials. Application of the salary basis test will inherently impair that accountability.

4. Certiorari should be granted because of the importance of the issues

to public employees, public agencies and the public at large. Billions of dollars are potentially at stake. There are numerous cases pending in the lower federal courts which involve the application of this aspect of the salary basis test to public employees. There are inconsistencies and conflicts among the lower federal courts in their treatment of this aspect of the salary basis test to public sector employees. Intervention by this Court through issuance of a writ of certiorari will promote judicial economy and bring an early, definitive ruling.

ARGUMENT

I. APPLICATION OF THIS ASPECT OF THE SALARY BASIS TEST TO EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES EMPLOYED BY PUBLIC ENTITIES IS INCONSISTENT WITH THE REGULATORY POLICY AND HISTORY OF THE FLSA

The Act exempts from its overtime and minimum wage provisions "any employee employed in a bona fide executive, administrative or professional capacity." See 29 U.S.C. § 213(a)(1). The Act contains no further definition of who is deemed an executive, administrative or professional employee. As relevant to executive, administrative or professional employees, the statute has remained unchanged since its enactment. See 29 U.S.C. § 213, Historical Note.

The Secretary of Labor is expressly authorized to "define and delimit" these exempt categories. 29 U.S.C. § 213(a)(1). Left with little congres-

sional guidance, the DOL adopted regulations in 1949 which first defined the so-called salary basis test for determining which employees would come within the executive, administrative and professional exemption.

Central to an understanding of the error below is that these regulations were adopted at a time the FLSA did not cover public employers; indeed, years before the FLSA was ever amended to cover the public sector employment situation.

Consequently, the Secretary of Labor, in discharging his statutory obligation to define the exemption, could not and did not take into account the critical differences which exist in employment conditions between the public and private sectors. The regulations could only have been intended to cover private

sector employment. The concept of governmental accountability in response to "the people's right to know," as reflected in such laws as public records acts,[8] is, of course, uniquely applicable to public sector employment. Furthermore, the direct relationship that commonly exists in private employment whereby managerial, administrative and professional employees are traditionally paid on a salary basis and other employees are paid on an hourly basis simply does not exist in the public sector. This inapplicability of the salary basis test to public employment is borne out by the subsequent regulatory history of the salary basis test.

The Garcia decision became final in

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[8] For example, the California Public Records Act, Government Code § 6250 *et seq.*

April 1985. In November 1985, the DOL published an advance notice of proposed rulemaking concerning 29 C.F.R. Part 541. Among the numerous questions which the Department posed was a request for comments with respect to whether local civil service system classifications should apply in determining exempt status under 29 U.S.C. § 213. See 50 Fed.Reg. 47696-01 (1987).

On January 16, 1987, the Department published its final rules for application of the FLSA to employees of state and local governments with respect to 29 C.F.R. Part 553. See 52 Fed.Reg. 2012-01 (1987). These regulations in part addressed certain of the issues raised by the 1986 amendments to the FLSA. DOL did not, however, issue regulations pertaining to the executive, administrative, and professional exemption.

It noted that it had received several comments that the salary basis test contained in 29 C.F.R. Part 541 should be modified to permit public agencies to make deductions from an exempt employee's salary for absences of less than a day in deference to local governmental policies mandating such accountability by all levels of public employees. The DOL indicated that since proposed rulemaking was then in progress, that it "would not be appropriate for the Department to address this issue in developing a final rule for Part 553." 52 Fed.Reg. 2012-01, p. 39.

The DOL has not as yet issued new regulations concerning 29 C.F.R. Part 541. Instead, it adopted a nonenforcement policy with respect to the salary basis test as it applied to executive, administrative and professional

employees employed by public entities.

The DOL issued an Administrative Letter Ruling on January 9, 1987. It states:

> "It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment as discussed in section 541.118 or 29 CFR Part 541. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness or accident, and the employee has not accrued, or has exhausted, paid leave time, such employee is paid only for hours actually worked in accordance with applicable State or local law. This practice is similar to the practice applicable to Federal employees. Consequently, a public employer may make deductions from pay for absence(s) on an hourly basis which is contrary to the position in section 541.118 that deductions may be made only for absence(s) of a day or longer.
>
> "Revisions to the provisions of 29 CFR Part 541, including the salary tests, have been under consideration as indicated in the

Advance Notice of Proposed Rulemaking (ANPR) published in the *Federal Register* on November 19, 1985 (50 FR 47696). The ANPR was published in order to obtain the views of the public on needed changes in the regulations. A commentor representing public employers has pointed out the problem described above and has proposed changes in section 541.118 that would allow deductions to be made for absence(s) of less that (sic) a day, or to eliminate the salary test entirely.

"While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees. Wage-Hour will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).

"This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave."

The Ninth Circuit's disregard of the DOL's Administrative Letter Ruling departs from the regulatory history of the Act and Congressional intent.

The DOL has a statutory obligation to define the scope of exemptions under 29 U.S.C. § 213. An administrative interpretation of a statute by its enforcing agency, here the DOL, is entitled to great deference. Griggs v. Duke Power, 401 U.S. 424, 433-434 (1971). Further, the interpretation need not itself be reduced to regulation form. The interpretation need only be enunciated and reasonable in its application. Federal Deposit Insurance Corp. v. Philadelphia Gear Corp., 476 U.S. 426, 438-440 (1986). Indeed, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it

is wrong. Miller v. Youakim, 440 U.S. 125, 144 (1979).

The DOL, having set forth its interpretation of the salary basis test as applied to public agencies, cannot be lightly disregarded. It is manifest that the salary basis test, which was first described in regulations adopted in 1949, was intended and indeed could have only been intended for the private sector employment situation. Great deference is to be accorded to the DOL in its interpretation of its own regulations. Zenith Radio Corp. v. United States, 437 U.S. 443, 450-451 (1978).

The Abshire decision also conflicts with the policy adopted by this Court that the standards of enforcement of the FLSA by DOL and enforcement in private actions should not be at variance. Skidmore vs. Swift & Co., (1944) 323

U.S. 134. There the Court stated:

> "The Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." (Emphasis added.) *Id.* at 139, 140.

There is no reason for the variance between enforcement of rights by private litigants (such as the Plaintiffs in Abshire) and enforcement by DOL, which results from the Abshire decision.

The DOL's policy of not enforcing this aspect of the salary basis test with respect to public sector employees is wholly consistent with the Congressional intent of the FLSA. The

Act expressly exempts bona fide executive, administrative and professional employees. Furthermore, the principal Congressional purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working conditions, "labor conditions that are detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well being of workers." 29 U.S.C. § 202(a). See also Barrentine v. Arkansas-Best Freight Systems, 450 U.S. 728, 739 (1981). This Congressional policy is not ill served if hourly premium overtime compensation is denied to public agency managers, most of whom earn salaries of over $50,000 per year, and, in a number of cases, over $100,000

per year.[9]

The decision below also fails to give appropriate deference to the administrative interpretation of the DOL because it misapplies the Administrative Letter Ruling. The Ruling stated that the non-enforcement policy would be followed where the public employer could show that provisions contained in the applicable state or local law in effect prior to April 15, 1986, prohibited payments to an employee for absences of less than one day for personal reasons or because of illness or accident which are not covered by available paid leave. The

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[9] For example, in Amici City and County of San Francisco, employees designated as exempt earn salaries ranging from $28,000 to over $100,000 annually. Their average annual salary is approximately $55,000. The City of Los Angeles employs some 3,000 employees which are exempt, most of whom earn over $55,000 per year.

Ninth Circuit failed to give appropriate deference to the interpretation of DOL because the Ninth Circuit focused exclusively, and erroneously, on only one aspect of State law, i.e., the prohibition on gifts of public funds contained in the California Constitution. See Abshire at p. 489. However, the Ninth Circuit failed to consider the existence of local ordinances or regulations which fit within the standard established by DOL. Virtually all Amici have adopted provisions by charter, local ordinance or regulation, whereby public employees of the respective agency shall not be compensated for absences of less than a day when not covered by available leave time.

II. APPLICATION OF THIS ASPECT OF THE SALARY BASIS TEST TO EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES IN THE PUBLIC SECTOR IS INCONSISTENT WITH CONGRESSIONAL INTENT

Application of this aspect of the salary basis test to executive, administrative and professional employees of local government is inconsistent with Congressional intent for several reasons. First, the legislation itself expressly exempts executive, administrative and professional employees, and the holding in Abshire would to a substantial extent frustrate such Congressional intent. Second, the Congressional intent which underlies the FLSA is the removal of the social evils associated with oppressive and inhuman working conditions--a legislative intent clearly not at issue with respect to highly compensated managerial and professional

personnel. Third, testimony before the Congress and statements from the committee reports indicate that the 1974 amendments were intended to authorize application of the FLSA only to non-supervisory municipal employees. The legislative record reflects an understanding on the part of Congress that executive, administrative and professional employees of public agencies would not be the beneficiaries of the premium pay overtime provisions of the Act. Last, it is apparent from reviewing the legislative history behind the 1974 amendments that Congress did not intend that application of the FLSA to local government would have the dramatic fiscal impact which application of this aspect of the salary basis test will have upon state and local government.

A. Application of This Aspect of the Salary Basis Test Is Inconsistent with the Congressional Policy Which Underlies the 1938 Act

The Fair Labor Standards Act was enacted in 1938 while this nation remained in the throes of the most serious economic depression in its history. Low wages, long working hours and high unemployment plagued the nation. The stated purpose of the Act was to correct, and, as rapidly as practicable, to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers. See Senate Report No. 1487, Fair Labor Standards Amendments of 1966, pp. 3002-3003. The Act was designed to give specific minimum protection to individual workers and to ensure that employees other than highly compensated

managerial, supervisory and professional employees would receive "a fair day's pay for a fair day's work" and would be protected from the "evil of overwork as well as underpay." Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942).

Certainly exempting highly paid managerial and professional employees, such as those employed by Amici, is not inconsistent with the purposes of the Act. The majority of these employees earn well in excess of $50,000 annually.

B. Congressional History and Intent Behind the 1974 Amendments to the Act

Several aspects of the legislative history of the 1974 amendments to the Act lead to the conclusion that Congress did not intend to confer a right to premium pay overtime on otherwise exempt public agency managers. The report of

the Senate Subcommittee on Labor expressed its concerns about wholesale extension of the overtime provisions of the FLSA to public employees. Senate Report No. 93-300, pp. 502-504, 600-601.

The House Report on the 1974 amendments to the Act clearly show a Congressional intent that supervisory employees were not intended to be the beneficiaries of the Act's provisions. Thus, the House Report states:

> "The bill extends the minimum wage and overtime coverage to about 5,000,000 non-supervisory employees in the public sector not now covered by the Act ... the bill will provide that virtually all non-supervisory government employees will be covered." House Report No. 93-913 at p. 2837.

The House Report commented extensively on Department studies concerning overtime in the public sector. Significantly, these DOL studies focused on <u>non-supervisory</u> employees employed in

state and local governments. The House Report quoted extensively from this Department report which was focused on non-supervisory man-hours worked in state and local governments. The DOL's report indicates that only 2.3 of non-supervisory employee man-hours in state and local government exceeded 40 hours. The Department report, upon which the Congress relied, went on to conclude that the "actual impact on state and local governments of a 40-hour standard will be virtually non-existent." See House Report No. 93-913, pp. 2837-2838.

III. APPLICATION OF THIS ASPECT OF THE SALARY BASIS TEST TO EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES OF PUBLIC AGENCIES VIOLATES THE TENTH AMENDMENT

In Garcia, this Court did not rule out judicial review of Congressional action which might impinge on state sovereignty under the Tenth Amendment.

The Court left open for future clarification consideration of circumstances wherein the political process resulted in legislation which impinged on state sovereignty. As the Court stated:

> "The political process ensures that laws that unduly burden the states will not be promulgated. In the factual setting of these cases, the internal safeguards of the political process have performed as intended. These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the states under the Commerce Clause." 469 U.S. at 556.

The Garcia decision spawned a flood of commentaries in the legal journals. Several of these noted that the Court's decision in Garcia did not foreclose subsequent judicial review if the borders of the Tenth Amendment were crossed

by application of a federal law.[10] Amici respectfully submit that application of this aspect of the salary test crosses the borders of state sovereignty established by the Tenth Amendment.

Local agencies represented by Amici have traditionally required all of its employees, including its most senior executive staff, to account for all time intended to be compensated by their salary. It is this accountability to the agency, and to the public it serves, which is central to the Amici's argument that application of this aspect of the salary test crosses the border of the

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[10] See e.g. Lipner, Imposing Federal Business on Officers of the State: What the Tenth Amendment Might Mean, 57 George Washington Law Review 907 (1989); Van Alstyne, The Second Death of Federalism, 83 Mich. Law Review 1709, 1722-1725 (1985); Barrante, States Rights and Personal Freedom: Breathing Life into the Tenth Amendment, 63 Connecticut Bar Journal 262 (1989).

Tenth Amendment's limitations on intrusions into state sovereignty. Such application of the salary test would prohibit state and local government from enacting policies that define the degree of control they are legislatively entitled to exercise over their managerial and professional staff.

It was perhaps this very concern which prompted the dissenters in Garcia to state:

> "By usurping functions traditionally performed by the states, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the states and the federal government, a balance designed to protect our fundamental liberties." 469 U.S. at 572.

The Tenth Amendment by its terms speaks not only of rights reserved to the states, but rights reserved to the people. Certainly, this accountability is fundamental to the operation of local

government and to the people it serves.

IV. APPLICATION OF THE SALARY TEST WOULD IMPAIR OPERATION OF THE POLITICAL PROCESS AND THEREBY DEFEAT THE VIEW OF THE CONSTITUTION ESPOUSED BY THE COURT IN GARCIA

In Garcia, this Court stated:

> "But the principal and basic limit on the federal commerce power is that inherent in all congressional action - the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the state will not be promulgated. In the factual setting of this case, the internal safe-guards of the political process have performed as intended." *Id.* at 556.

Here, if the aspect of the salary test in issue is permitted to be applied to public employees when the regulatory process has not as yet run its course, the political process will not "have performed as intended." It is the DOL which has the authority to implement and administer the exemption provisions of

the Act. If the decision below is permitted to stand, then the political process, and the view of federalism espoused by the Court in Garcia, will itself have been frustrated. It is the regulatory mechanism, a part of the political process in which the states and their political subdivisions may participate, which should be permitted to define how the FLSA will be applied and implemented. The decision below is at odds with this aspect of Garcia. For this reason alone, the decision below should be vacated or a writ of certiorari should issue.

V. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE SIGNIFICANCE OF THIS CASE

A. This Issue Effects Hundreds of Thousands of Public Employees and Hundreds of Public Agencies

A vast majority of the 518 counties and cities represented by Amici have

local laws, policies or regulations providing for deductions in pay for absences of less than one day under specified circumstances. Thus, each employee classified as exempt has the potential to receive retroactive premium overtime compensation for a period of at least two years plus an equal amount of liquidated damages plus interest and attorneys' fees based on the outcome of this decision. In addition, the policies of public agencies for governmental accountability to the public will be impaired by the Federal Government. Given the broad ranging significance of this case, and its impact on local government and on public employees, certiorari should be granted.[11]

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[11] Patterson v. Lamb, 329 U.S. 539 (1947).

B. **The Fiscal Impact of This Decision on Public Agencies is Enormous**

The fiscal consequences of the decision below on the public agencies represented by Amici are enormous. As indicated, supra, internal studies conducted by Amici as to the potential cost of past overtime liability indicate that as to California cities and counties alone, the cost would exceed $2 billion. These financial implications should be given substantial weight, and, therefore, certiorari should be granted.[12]

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[12] See United States v. Mitchell, 463 U.S. 206, 211 n.7 (1983); Commissioner of Internal Revenue v. Standard Life & Accident Insurance Company, 433 U.S. 148, 151 n.5 (1977); American Can Co. v. Territory of Alaska, 358 U.S. 224 (1959) (certiorari granted in view of the fiscal importance of the question to Alaska).

C. Lower Federal Court Decisions Addressing the "Salary Test" Have Been Inconsistent and in Conflict

Since this Court's decision in Garcia, supra, the issue as to whether deductions in a salaried employee's salary for absences of less than a day defeats the administrative or executive exemption has been the subject of numerous federal district court decisions. Federal district court decisions have been inconsistent so as to leave the law, as it applies in the public sector, in a state of confusion.[13]

The inconsistency in the federal district courts, and the numerous lawsuits which are currently pending, counsel for an early resolution and clarification of this issue by the Court.

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[13] See Appendix A for listed cases.

D. There Are Numerous Cases Pending in Lower Federal Courts Which Involve Disputes Over Application of the "Salary Test"

The issue as to whether certain public employees are paid on a "salary basis," as that term is defined in 29 C.F.R. § 541.118(a), where deductions are made from employees' salary for absences of less than a day's duration, is the subject of numerous federal district court cases which are currently pending.[14] The conflicts in the federal courts and the numerous cases which are pending point to the wisdom of granting certiorari.[15]

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[14] See Appendix B for listed cases.

[15] Laing v. United States, 423 U.S. 161, 167 (1976); United States v. Standard Oil, 332 U.S. 301, 302 n.2 (1947); United States v. Powell, 330 U.S. 238 (1947).

CONCLUSION

It is respectfully requested that a Writ of Certiorari be granted, or in the alternative the decision below be vacated, because that decision:

* Is contrary to that of the administrative agency designated by law to implement the Act, and

* Is contrary to Congressional intent, and

* Is contrary to the dictates of the Tenth Amendment of the Constitution, and

* Has enormously significant fiscal and policy impact on state and local government.

Granting a writ will bring an early, definitive ruling to an issue which has been the source of conflicting decisions and considerable litigation in the lower courts.

Dated: December 26, 1990

Respectfully submitted,

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John Liebert
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By _____
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By _____
Peter J. Brown

APPENDIX A

APPENDIX A

See Sarver v. City of Roanoke, Virginia, 29 Wage & Hour Cas. (BNA) 1442 (W.D.Va. 1990); Wright v. City of Jackson, Mississippi, 727 F.Supp. 1520 (S.D. 1989); D'Camera v. District of Columbia, 722 F.Supp. 799 (D.D.C. 1989); Wilks v. District of Columbia, 721 F.Supp. 1383 (D.D.C. 1989); International Association of Firefighters, Alexandria Local 2141 v. City of Alexandria, Virginia, 720 F.Supp. 1230 (E.D.Va. 1989); York v. City of Wichita Falls, Texas, 727 F. Supp. 1076 (N.D. Tex. (1989); Wilson v. City of Charlotte, 717 F.Supp. 408 (W.D.N.C. 1989); Harris v. District of Columbia, 709 F.Supp. 238 (D.D.C. 1989); Hawks v. City of Newport News, Virginia, 707 F.Supp. 212 (E.D.Va. 1988); Banks v. City of North Little Rock, 708 F.Supp. 1023 (E.D.Ark. 1988); District of Columbia Nurses Association v. District of Columbia, 29 Wage & Hour Cas. (BNA) 868 (D.C.D.C. 1988); Knecht v. City of Redwood City, 683 F.Supp. 1307 (N.D.Cal. 1987).

APPENDIX B

APPENDIX B

James Stewart et al. v. City and County of San Francisco, C-90-3206-Cal, N.D.CA, (This case is a class action with a class size of potentially 4400 employees); Paul Edgington et al. v. City of Reno, CV-N-90-583-ECR, D.C. Nev.; Benjamin Fletcher v. District of Columbia, 90-2949 D.D.C.; Shepard et al. v. State of California [California Department of Forestry and Fire Protection], CIVS-90-221-LKK--EM, E.D.Cal.; Phillips et al. v. State of California, CIVS-90-167 LKK--EM, E.D.Cal.; Nadeau et al. v. State of California, Department of Justice, CIVS-89-0119-LKK--EM, E.D.Cal.; Alex et al. v. State of California, California Department of Forestry and Fire Protection, CIVS-89-0032-LKK--EM, E.D.Cal.; Jerline Baker et al.v. District of Columbia, 89-2050, D.D.C.; Dennis Abrams et al. v. County of Los Angeles, CV-88-6982 HLH C.D.CA.

AMICUS CURIAE

BRIEF

No. _____

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF KERN,

Petitioner,

vs.

DAN ABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE McKENZIE, BOB TEMPLE, BARRY SCHULZ, JIM CHAPMAN, BOB TURNER, and STEVE McLEMORE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the so-called "salary basis" test set forth in 29 C.F.R. §541.118(a), which states that when an employee's pay may be reduced for absences of less than one day that employee is not truly salaried and, therefore, cannot meet the bona fide executive, administrative, or professional employee exemption constitute an unconstitutional application of the Fair Labor Standards Act (FLSA) to public employers?

2. Have the protections of the political process, which constitutes the basis for the rationale set forth in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), failed to function, thereby undermining state sovereignty because Congress did not address the salary test issue and the Department of Labor (DOL) has avoided addressing the issue?

3. Should there be a return to the traditional versus non-traditional governmental functional analysis abandoned under *Garcia v. SAMTA* in order to prevent federal regulation of essential governmental functions usurping states' rights under the Tenth Amendment?

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ARGUMENTS

I. THE 1974 AMENDMENTS TO THE FLSA, AS MADE APPLICABLE TO THE STATES AFTER *GARCIA v. SAMTA*, HAVE AN ENORMOUS ADVERSE ECONOMIC EFFECT ON THE STATE OF CALIFORNIA AND ITS POLITICAL SUBDIVISIONS SO AS TO EFFECTIVELY DENY THE PROPER FUNCTIONING OF STATE GOVERNMENT.

In *Abshire, et al. v. County of Kern* 908 F.2d 483 (1990) the Ninth Circuit concluded that plaintiffs were covered by the FLSA because their pay was subject to deduction for absences of less than one day. The FLSA provides that bona fide executive, administrative, or professional employees are exempt from the Act. (29 U.S.C. §213(a)(1).) Congress left it to the DOL to develop the criteria for the application of these exemptions. (29 U.S.C., § 213.) At the time DOL adopted regulations for this purpose, the Act was applicable only to the private sector. In addition to establishing a duties test for each exemption, DOL also required that for any exemption to apply an employee must meet a salary test. (29 C.F.R. §§541.1, 541.2, 541.3.) The *Abshire* decision held that plaintiffs were not salaried and hence were not exempt. In applying 29 C.F.R. §541.118(a) (the salary basis test) literally, the Court found it irrelevant that no deductions had actually been made to plaintiffs' pay.

This literal application of the salary basis test to civil service employees of the State of California is devastating. California, like most public employers, views itself as accountable to the taxpayer and therefore generally

prohibits payment for hours not worked. This unremarkable similarity between California's salary regulations and practices and the County of Kern's salary regulations and practices means that most State employees will be deemed hourly employees and hence covered by the FLSA, under the rationale of the *Abshire* decision, should it remain undisturbed. This is not mere speculation: the State of California is currently litigating four FLSA cases brought by groups of consenting plaintiffs in which the "salary basis" test is central to plaintiffs' claims.

The first, *Nadeau, et al. v. State of California, Department of Justice,* CIVS-89-0119-LKK – EM, concerns 278 special agents of the State of California, Department of Justice. In a partial summary judgment dated May 7, 1990, the trial court concluded that plaintiffs were not salaried employees since their salaries were subject to reduction for absences of less than a day. The Court also concluded that liquidated damages were appropriate. The state faces a trial on the issue of whether the liability period should be extended another year. Although this decision preceded the Ninth Circuit's decision in *Abshire,* as will be seen, the *Abshire* decision preordains a similar conclusion in the other pending cases. The State's exposure in the *Nadeau* case alone is approximately 4.2 million dollars not including the possibility of an extended liability period.

The State is also a defendant in *Alex, et al. v. State of California, California Department of Forestry and Fire Protection,* CIVS-89-0032-LKK – EM. On December 17, 1990, the Court, citing *Abshire,* granted partial summary judgment to plaintiffs on issues of liability and liquidated damages on the grounds that the plaintiffs, 32 Fire Prevention

Officers, are not paid on a salary basis because their pay is subject to reduction for absences of less than one day. Thus, regardless of their duties, they have been deemed covered by the FLSA. The potential liability is large because like many fire prevention personnel, they have duty weeks in excess of 40 hours during the fire season.

The State is currently a defendant in *Shepard, et al. v. State of California (California Department of Forestry and Fire Protection)* CIVS-90-221-LKK – EM. This case involves 250 Forest Rangers who, under the holding in *Abshire* will be found covered by the FLSA, regardless of their actual duties.

Finally, but not least of all, the State is currently defending itself in *Phillips, et al. v. State of California* CIVS-90-167-LKK – EM. This case seeks to gather many remaining State employees (approximately 35,000) who may have a claim under the FLSA based on the assertion that they are not compensated on a salary basis. Currently, over 2,000 employees have consented to join in this action. It is impossible to estimate the potential liability in this case since the number of consenters is not fixed at this point in time, they work for a variety of different state departments, and their overtime experiences are highly individual. Liability will undoubtedly exceed that of the other cases.

Of the 180,000 civil service employees in California, approximately 35,000 employees who have been considered exempt from the FLSA by the State of California are the focus of these lawsuits. The State may also be vulnerable with respect to another 25,000 employees considered exempt, although to date there are no lawsuits filed with

respect to this group. The State is, thus, liable for many millions of dollars in unpaid overtime and liquidated damages, as well as prospective future costs whenever overtime is necessary to carry out vital State functions. In addition, State monies remitted to localities will in part be used to cover increased local costs as a result of *Abshire*. This liability attaches under *Abshire* because of the mere potential that such employees can have their pay reduced and would apply even though actual instances of such reductions are rare or nonexistent. The application of the salary basis test to the State of California is, thus, of great magnitude and budget-breaking consequence. Given the State's current projected deficit of one billion dollars in Fiscal Year 90-91 and approximated deficit of six billion dollars in Fiscal Year 91-92, the cost of applying the salary basis test exacerbates an already bleak financial crisis.

II. THE DEPARTMENT OF LABOR HAS BEEN IRRESPONSIBLE AND MISLEADING WITH RESPECT TO THE APPLICATION OF 29 C.F.R. §541.118(a) TO PUBLIC JURISDICTIONS. AS A CONSEQUENCE PUBLIC JURISDICTIONS HAVE HAD NO OPPORTUNITY TO RESOLVE THEIR CONCERNS THROUGH THE POLITICAL PROCESS.

A. LEGISLATIVE HISTORY

Following the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 479 U.S. 528 (1985), Congress enacted amendments to the FLSA which temporarily delayed the implementation of the FLSA on state and local governments. (Weekly compilation of Presidential documents, Nov. 18, 1985; Fall, 21, No. 46 pp.

1390-1391.) During the one year while implementation was delayed, Congress sought to amend the FLSA to make it more suitable for application to the public sector. After joint conference, the measure passed as Public Law 99-150.

B. REGULATORY HISTORY

On November 19, 1985, after the *Garcia* decision, the DOL published in the Federal Register advance notice of proposed rulemaking concerning 29 C.F.R. Part 541. (50 FR 47696). The DOL posed a number of questions focusing on the salary test as used in the administrative, executive, and professional exemptions. (50 FR 47696-47697). In particular, DOL asked:

> Should the department recognize individual state and local government civil service systems for classifying EPA (executive, professional, and administrative) employees in applying the exemption to employees of such governments?

This and other questions posed by the Department would provide a forum for discussion of the appropriateness of applying the salary test to public jurisdictions.

As a result of the *Garcia* decision, attention naturally focused on application of the FLSA to hitherto exempt public functions. The Congressional hearings preceding passage of P.L. 99-150 explored the financial consequences of *Garcia*, but nowhere was the issue of the application of 29 C.F.R. §541.118(a) discussed or even presented.

DOL took no action on its advance notice of proposed rulemaking regarding 29 C.F.R. §541 but rather,

prior to acting on these proposals, published in the Federal Register its final rule regarding 29 C.F.R. part 553 – "Application of the Fair Labor Standards Act to Employees of State and Local Governments; Final Rule." At 52 FR 2019, DOL noted:

> Finally, several commentators requested various forms of special treatment for state and local governments with respect to the section 13(a)(1) exemption for bona fide executive, administrative, and professional employees, particularly with respect to the requirement in 29 C.F.R. part 541 that such employees be paid on a salary basis.
>
> The commentators argued that state and local governments should be permitted to make deductions from an exempt employee's salary for absences of less than a day. They argued that this change is necessary to recognize current payroll practices, as well as state and local governmental laws which preclude the payment of wages for hours not worked (except by earned leave).
>
> On November 19, 1985, the DOL published in the Federal Register (50 Fed.Reg. 47696) an advance notice of proposed rulemaking requesting the views of the public on any changes they felt were necessary in 29 C.F.R. part 541. The comment period ended on March 22, 1986. However, the department expects to publish a notice of proposed rulemaking concerning part 541 during 1987. Interested parties will have an opportunity to offer comments on the subject matter of that regulation at that time.
>
> In light of the separate rulemaking process with respect to part 541, it would not be appropriate for the department to address this issue in developing the final rule for part 553.

Thus, in finalizing rules pertaining to state and local governments, DOL was put on notice of objections to the salary basis test. However, it deferred action to the pending consideration of amendments to 29 C.F.R. §541. Inexcusably, DOL has not reconsidered 29 C.F.R. §541 and contrary to its express indication, did not publish a notice of proposed rulemaking concerning section 541 during 1987, or any time since. Thus, the department has never acted formally to permit consideration of alternatives to the salary basis test for state and local governments.

By denying public jurisdictions an opportunity to comment on regulations which affect them, DOL has effectively circumvented the notice and comment provisions of 5 U.S.C. §553. Thus, a fundamental safeguard of the federal rulemaking system has been denied.

C. THE DEPARTMENT OF LABOR'S NON-ENFORCEMENT POLICY.

To compound the problem, DOL issued an unnumbered letter ruling on January 9, 1987, stating in effect that while the department was considering revisions to the provision of 29 C.F.R. §541, including the salary test, "a non-enforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees." The letter ruling went on to say that the non-enforcement policy would be followed only where the public employer could show that provisions contained in the applicable state law in effect prior to April 15, 1986, prohibited payments to an employee for absences of less than one day for personal reasons or because of illness or accident which are not covered by

available paid leave. The letter ruling made it clear that "this non-enforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA."

The DOL obviously recognizes the inappropriateness of the salary basis test when applied to state and local government employees. However, while DOL will not itself prosecute and will not act to change the test, enforcement is, nevertheless, left to private citizens who frequently seek liquidated damages in excess of those sought by the department itself in areas where it chooses to litigate. The oppressive paradox to government is that when private enforcement occurs, it is more expensive to the governmental employer even though DOL's own policy has suggested that application of the salary test to the public sector is not appropriate.

It is, therefore, apparent that the political process (the approved avenue of recourse discussed in *Garcia* for ensuring that laws and regulations implementing such laws do not unduly burden the states) has utterly failed to function responsibly. It is time to revisit the serious issues raised in *Garcia* in light of the fact the regulatory process operates slowly and imperfectly while public jurisdictions are exposed to enormous liability and forced to focus their limited energies and economic resources on compliance pending political resolution.

III. APPLICATION OF THE FLSA TO ESSENTIAL PUBLIC SERVICES NOT IN COMPETITION WITH THE PUBLIC SECTOR SUCH AS FIRE-FIGHTING UNDULY INTERFERES WITH THE STATE'S SOVEREIGN FUNCTIONS

The State of California believes, for its part, that the proper balance of state versus federal power was carried

out under the rationale set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and its companion case, *State of California v. Brennan*, (October Term, 1974, Case 74-879), in which the Court found the FLSA to be inapplicable to state and local government employees as the amendments to the FLSA displaced the freedom of states to structure integral operations in areas of traditional governmental functions including firefighting.

The doctrine of federalism embodied in the Tenth Amendment to the United States Constitution is one intended to assure that local concerns will be administered, superintended, and regulated by the states as those are the governmental affairs with which the people are "more familiar and minutely conversant." (The Federalist, No. 46, p. 316.) As the dissent noted in *Garcia*, it is precisely in the true areas of traditional governmental functions that the paramount interest of state and local accountability is disserved by federal intervention under the guise of the Commerce Clause (*Garcia v. SAMTA*, 469 U.S. at 572 (POWELL, J., dissenting)).

Certainly, no areas of local concern can be better articulated than functions not carried out at all in the private sector, such as the local firefighting efforts at issue in *Abshire*, and state firefighting and drug enforcement functions at issue in California's current FLSA litigation described above.[1] An impact of the magnitude of

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[1] Similarly, in the case of *Bratt, et al. v. County of Los Angeles*, 912 F.2d 1066 (1990), the Ninth Circuit, finding itself compelled to act under the *Garcia* rationale, decided that probation and child protection activities at the county level were

(Continued on following page)

the FLSA's provisions, especially when states such as California are in an era of financial crisis for the foreseeable future, does much to undermine the quality and contained cost of such vital services. In this manner, the FLSA's effect is too significant an infringement on governmental aspects of state sovereignty to survive constitutional muster under a Tenth Amendment analysis. There simply are no demonstrably greater federal interests at stake here which would legitimately override state and local governments' rights to see to their own most efficacious providing of services.

(Continued from previous page)

subject to the provisions of the FLSA. These services are likewise unique to being carried out by governmental entities. Los Angeles County has filed a petition for writ of certiorari with your Court. The State of California believes that the writ should also be granted for the reasons set forth therein.

CONCLUSION

The State of California respectfully prays that a Writ of Certiorari be granted. The literal application of 29 C.F.R. §541.118(a) to County of Kern and by extension the State of California is both economically devastating and wrong.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 90-839

DEC 27 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

COUNTY OF KERN,

Petitioner,

vs.

DANABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARDPELLERIN, BILLIE McKENZIE, BOB TEMPLE,BARRY SCHULTZ, JIM CHAPMAN, BOB TURNER, and STEVE McLEMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND13 OF ITS STATE AFFILIATES, AS AMICI CURIAE IN SUPPORT OF THI PETITION FOR CERTIORARI

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In The
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COUNTY OF KERN,

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INTERESTS OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

The *Amici* hereinafter described file this Brief because of their ongoing concern with one of the issues presented herein:

Whether *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) should be overruled.[1]

Garcia eliminated the Tenth Amendment immunity of state, county and local governments (hereinafter the "States"), previously outlined in *National League of Cities v. Usery*, 426 U.S. 833 (1976), from overreaching federal legislation enacted under the Commerce Power. In the process, it authorized for the first time full-scale application of the minimum wage and overtime requirements of the federal Fair Labor Standards Act, as Amended, 29 U.S.C. § 201 *et seq.* (1989) ("FLSA") to the States. *Amici* are all organizations whose members are responsible for developing and implementing employment and labor relations policies, including those pertaining to FLSA requirements, in public jurisdictions at all levels of state, county and local government nationwide. Since *Garcia*, *Amici* and their respective member jurisdictions have experienced severe erosion of their sovereign right to structure employer-employee relationships, to determine what government services are to be provided to their citizens, and to determine how those services are to be provided.

The National Public Employer Labor Relations Association (NPELRA) is a national organization composed of more than 2,400 members who are predominantly full-time city, county, and state government professionals charged with the responsibility for implementing employment and labor relations policies affecting over four million public employees. NPELRA members reside in all 50 states and are employed by jurisdictions with as few as 25 employees and as many as 200,000-plus employees. These include New York City, the City of Chicago and the State of California.

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[1] The *Amici* generally support the position of Petitioner County of Kern.

The 13 state affiliates of NPELRA[2] are separately incorporated organizations whose members are also NPELRA members or are eligible for NPELRA membership. The state affiliates' members likewise are management and labor relations professionals at all levels of state, county, and local government. Whereas the focus of NPELRA is national in scope, the focus of the state affiliates is on issues germane to their respective jurisdictions as well as on national issues.

Written consent of all parties to the filing of this Brief has been obtained, and said consents are on file with the Clerk of this Court. Pursuant to Rule 29 of the Rules of this Court, *Amici* note further that 28 U.S.C § 2403(a) may be applicable.

REASONS FOR GRANTING THE PETITION

I. *GARCIA* SHOULD BE OVERRULED BECAUSE IT UNCONSTITUTIONALLY VITIATES TENTH AMENDMENT IMMUNITY AND MAKES THE NON-JUDICIAL BRANCHES OF THE FEDERAL GOVERNMENT THE FINAL ARBITERS OF INTERGOVERNMENTAL IMMUNITY DISPUTES

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the FLSA could not constitutionally be applied to the States pursuant to the federal government's Commerce Power, because to do so would "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," in violation of the Tenth Amendment. *Id.* at 852. Consistent with a long line of prior and

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[2] California Public Employer Labor Relations Association, Connecticut Public Employer Labor Relations Association, Florida Public Employer Labor Relations Association, Illinois Public Employer Labor Relations Association, Iowa Public Employer Labor Relations Association, Minnesota Public Employer Labor Relations Association, Missouri Public Employer Labor Relations Association, New York State Public Employer Labor Relations Association, Ohio Public Employer Labor Relations Association, Oregon Public Employer Labor Relations Association, Rocky Mountain Public Employer Labor Relations Association, Washington Council of Public Personnel Administrators and Wisconsin Public Employer Labor Relations Association.

subsequent decisions,[3] the Court recognized that the States as States occupy a unique status in the constitutional scheme and are not necessarily subject to federal regulation in the same way that private entities are. More specificallly, "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." *National League of Cities*, 426 U.S. at 845. In cases of alleged conflict between federal regulation pursuant to the Commerce Power and state autonomy, the Court performed a balancing analysis to determine whether state or federal interests would prevail. *Id.* at 856 (Blackmun, J., concurring). *See also EEOC v. Wyoming*, 460 U.S. 226, 239 (1983); *Hodel*, 452 U.S. at 287-288.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court overruled *National League of Cities*, *id.* at 557, in a way which all but eliminates considerations of state sovereignty in determining the constitutionality of federal enactments regulating state and local government activities. Under *Garcia*, the only Tenth Amendment limits on Congress' authority to regulate state activities are structural or procedural, not substantive. *Id.* at 554. *See also South Carolina v. Baker*, 485 U.S. 505, 512 (1988). In other words, ". . . States must find their protection from congressional regulation through the

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[3] *See, e.g., Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 684 (1982) and *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 288 (1981) (key inquiry is "whether the States' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional governmental functions"); *Fry v. United States*, 421 U.S. 542, 547, n.7 (1975) (Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system"); *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (federalism means a system in which national government exercises power in ways that "will not unduly interfere with the legitimate activities of the states"), *Lane County v. Oregon*, 74 Wall. 71, 76 (1868) ("[I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized"). *See also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588 (1985) ("As far as the Constitution is concerned, a State should not be equated with any private litigant.") (O'Connor, J. dissenting).

national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker, id., citing Garcia,* 469 U.S. at 537-554.

Not only is this a hollow protection in its own right, but the Court has virtually abdicated its role as the final arbiter of constitutional questions concerning the rights of state governments in our federal system. The Court made clear in *Baker* that neither *Garcia* nor the Tenth Amendment authorizes courts to "second-guess" the substantive basis for federal legislation. In order to establish a Tenth Amendment violation under *Garcia,* therefore, a State would have to show that the national political *process* operated in a "defective manner," *i.e.,* that the State was "deprived of . . . [a] right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 513. In short, as long as the State sends legislators to Congress, and the federal enactment in question has general application to the States, it is not subject to constitutional scrutiny by the Court.

This *Garcia* test leaves virtually no role for the Court, much less one to consider state autonomy in reviewing the federal government's exercise of its enumerated powers. *Id.* at 533-34 (O'Connor, J., dissenting); *Garcia,* 469 U.S. at 567 and n.12 (Powell, J., dissenting) *and* 469 U.S. at 588 (O'Connor, J., dissenting). But since the States' role in our federal system is itself a constitutional question, the Court cannot constitutionally delegate either to Congress or to the Executive the role of policing the constitutionality of their own enactments. *Marchetti v. U.S.,* 390 U.S. 39, 58 (1968); *State Bd. of Insurance v. Todd Shipyard Corp.,* 370 U.S. 451, 456-57 (1962). *See also EEOC v. Boeing Co.,* 843 F.2d 1213, 1217 (9th Cir.), *cert. denied,* 488 U.S. 889 (1988). That role is itself reserved by the Constitution to the federal courts. *Marbury v. Madison,* 1 Cranch 137, 177 (1803).

The Court's retreat in *Garcia* from its mandated judicial role is reason enough to reconsider and overrule *Garcia.* A return to the *National League of Cities* doctrine — in which the court must play a role in striking the proper balance between state

sovereignty and federal power — is in order. The Court should grant the writ of certiorari herein to permit reconsideration of *Garcia* at the earliest possible date.

II. *GARCIA* SHOULD BE OVERRULED BECAUSE IMPOSITION OF THE FLSA MINIMUM WAGE AND OVERTIME REQUIREMENTS HAVE IN FACT UNCONSTITUTIONALLY DIMINISHED THE SOVEREIGN RIGHTS OF STATE, COUNTY AND LOCAL GOVERNMENTS

Even *Garcia* acknowledges that the States must retain some measure of sovereign authority under our federal system. *Garcia,* 469 U.S. at 549. State sovereignty is self-governance, *i.e.,* "having the power to make decisions and to set policy." *FERC v. Mississippi,* 456 U.S. 742, 761 (1982). At least until *Garcia,* it was acknowledged that employment decisions, including those pertaining to compensation and hours of work for government employees, were the very types of decisions that epitomized the exercise of state autonomy. *EEOC v. Wyoming,* 460 U.S. 226, 238, n.11 (1983); *National League of Cities,* 426 U.S. at 845 (1976). *See also Abood v. Detroit Bd. of Education,* 431 U.S. 209, 228 (1977) (decisions of public employers are necessarily political decisions).

In *National League of Cities,* Justice Rehnquist predicted that imposition of FLSA requirements on the States would severely diminish the sovereign rights of state, county and municipal governments, by forcing a "relinquishment of important governmental activities," displacing state policies regarding how to structure delivery of required government services, and penalizing states "for choosing to hire governmental employees on terms different from those which Congress has sought to impose." 426 U.S. at 847, 849. In the wake of *Garcia,* the predicted erosion of state sovereignty has been dramatic, a testament to the "tyranny of small decisions" that with time can obliterate substantial rights. *See* L. Tribe, *American Constitutional Law* 302 (1978); *FERC v. Mississippi,* 456 U.S. 742, 774-75 (Powell, J., concurring in part and dissenting in part).

Since the late 1980's (*i.e.*, since *Garcia*), the States have been under ever-increasing pressure to deliver more services, more efficiently, with fewer revenue dollars, and without raising taxes. Reports are legion of the decaying infrastructures of our major cites and counties. State, county and municipal governments are under constant pressure to keep up with technological advances in the delivery of public health care services, police and fire protection services, and sanitation services. They are under constant pressure to at least maintain, if not improve, existing service levels in all service areas. They are under constant pressure to expand welfare services to cope with old and new social ills, *e.g.*, the reported increases of homeless persons all over the country.

In this same period of the late 1980's and early 1990's, federal subsidies to the states and their political subdivisions have been on a steady decline. One tax accountability referendum after another has appeared on the ballot in state and local elections. Politcial pressures have increased to hold the line on taxes at all levels of government. This has placed additional financial pressures on state and municipal entities in view of their declining federal revenues.

The superimposition of FLSA minimum wage and overtime requirements has severely restricted the options available to state governments and their political subdivisions to set policy, particularly against the foregoing background. In short, compliance with the FLSA has severely diminished their discretion to select, structure and prioritize delivery of government services. On the effective date of the FLSA requirements in April, 1986, the majority of state, county, and municipal governments around the country were automatically faced with significant cost increases simply to deliver the same level of services they had been providing prior to that date. One reason is that many goverment departments, fire departments in particular, employed shift schedules which exceeded the FLSA's statutory maximum for hours that could be worked without incurring time and one-half overtime pay obligations. International City Management Assn., *The Municipal Yearbook 1988* 139 (1988).

The city of Phoenix, Arizona[4] reports, for example, that FLSA overtime requirements resulting from its 56-hour weekly work schedule accounted for more than $1M per annum in increased wage costs in the Fire Department alone. The City of Yonkers, New York[5] similarly reports that it has incurred additional costs of $.5M per annum in statutorily required overtime payments in its Police Department. Fullerton, California,[6] with a population of approximately 112,000, reports that the FLSA resulted in immediate payroll cost increases of up to $200,000 per annum in its 85-person Fire Department. This was approximately 4.5% of its total payroll cost in the Department. And the three hospitals run by the State University of New York[7] report that collectively they incurred $405,000 in "new" overtime costs per annum directly as a result of the FLSA.

FLSA requirements have been directly responsible for additional *types* of cost increases. The instant case is a prime example. If the lower court's reading of the FLSA's "salary basis" test is permitted to stand, highly-paid supervisors in the County of Kern fire service will now be subject to FLSA overtime requirements, at a cost to the County of several hundred thousand dollars per annum.

Amici's members repeatedly cite other examples. Under the FLSA, various common functions that were either previously uncompensated or compensated through use of compensatory time, now must be counted, and therefore compensated, as "hours worked" within the meaning of the FLSA. Prior to 1986, employees called out on emergencies usually were compensated from the time they reached their work site and commenced work; under the FLSA, these employees must be compensated starting

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[4] The City of Phoenix as a member of Amicus Rocky Mountain Public Employer Labor Relations Association.

[5] The City of Yonkers is a member of Amicus New York State Public Employer Labor Relations Association.

[6] Fullerton, California is a member of Amicus California Public Employer Labor Relations Association.

[7] One such hospital, the Health Science Center at Syracuse, New York is a member of Amicus New York State Public Employer Labor Relations Association.

from when they leave home. Those hours, in turn, count toward reaching the weekly maximum after which time and one-half premiums must be paid. In Phoenix, this change alone has increased payroll costs by an additional $60,000 per annum.

Police canine units perform myriad functions in fighting drug-related crimes, in kidnapping cases, and in locating all types of criminal suspects. Police officers in canine units traditionally have cared for their dogs at home to facilitate bonding between dog and handler. Under the FLSA, time spent caring for such dogs at home is in many cases compensable "hours worked." Again, these additional hours worked are not only direct costs, but further increase overtime costs by increasing the speed with which employees surpass the "overtime threshold." The City of Newburgh, New York[8] reports that the FLSA-induced overtime costs attributable to its canine police unit are forcing a determination whether to continue the unit at all. Other New York municipalities are considering the same choice.

FLSA requirements have also resulted in substantial ancillary costs. The FLSA requires that premium payments, *e.g.*, hourly bonuses paid for working undesirable shifts, be counted in computing the *rate* at which time and one-half overtime payments must be paid. These calculations represent a change from prior practice in many jurisdictions, which often compensated overtime at straight time and/or at the base rate. This change has cost Phoenix, Arizona an additional $450,000 per annum above the costs previously described, directly as a result of FLSA application to the States. Fullerton, California has incurred up to an additional $10,000 per annum simply to comply with FLSA record-keeping and payroll processing requirements in its 85-person Fire Department. The City of Phoenix expends up to $150,000 per annum for this purpose.

These very substantial additional costs, directly attributable to FLSA requirements, are restrictive of state sovereignty in their own right. Money required by federal law to be spent to comply with federal minimum wage and overtime requirements cannot be spent to repair roads or open a shelter for homeless families.

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[8] Newburgh, New York is a member of Amicus New York State Public Employer Labor Relations Association.

It cannot be spent to hire more police officers or to buy new equipment for a public hospital. And it cannot be used to initiate an on-the-job training program for inner-city teenagers at training wages below the statutory minimum. In order to provide those services *and* comply with FLSA requirements, the government entity either must reduce, eliminate, or restructure other services, or raise additional revenues.

The FLSA's substantive requirements further limit the discretion of state, county and local officials to structure service delivery as their citizens may desire. For example, during winter months municipalities and county governments will have truck drivers on standby to be called out to operate extra snowplows, if needed because of weather conditions. Under the FLSA, the period such drivers are on standby often must be compensated as "time worked," even though such drivers may be sitting at home watching television with their families. The costs of this federally-imposed standby rule may require the municipality to reduce or eliminate standby drivers altogether, to change crew sizes, or to manipulate shift scheduling. These decisions, in turn, can affect the amount of available service, and the speed with which it is delivered. For example, if a municipality must eliminate standby time for expense reasons, response time in snow emergencies may diminish.

Undoubtedly, even without FLSA requirements, state and local governments would continue to have difficult choices to make concerning employee compensation, manning, scheduling and hours of work. But those choices would be their own, based on political decisions controlled by their own constitutencies, not by Congress and not by federal regulators. At least until *Garcia*, those types of decisions were the very essence of recognized state sovereignty, protected by the Constitution. As Justice Rehnquist predicted, imposition of FLSA requirements on the States has forced them to abandon services, has forced them to change service delivery methods, and has penalized them for policy choices different from the federal government's. This represents a substantial and indentifiable diminution in their ability to govern their own affairs. The States' constitutional autonomy now can only be restored with the reversal of *Garcia*.

CONCLUSION

The Petition for Writ of Certiorari should be granted to reconsider and overrule *Garcia*.

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